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No. 06-1057

In The
Supreme Court of the United States

CORUS STAAL BV,

Petitioner,

v.

UNITED STATES OF AMERICA
AND UNITED STATES STEEL CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF RESPONDENT UNITED STATES STEEL CORPORATION IN OPPOSITION

Robert E. Lighthizer
John J. Mangan
Counsel of Record
Jeffrey D. Gerrish
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111
(202) 371-7000
Counsel for Respondent
United States Steel Corporation

CERTIFICATE OF SERVICE

No. 06-1057

Corus Staal BV,

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v.

United States and United States Steel Corporation,

Respondents.

I, Jeffrey D. Gerrish, do hereby certify that, on this 2nd day of May, 2007, I caused three copies of the Brief of Respondent United States Steel Corporation in Opposition in the foregoing case to be served by hand delivery on the following parties:

Paul D. Clement, Esq.
SOLICITOR GENERAL OF THE UNITED STATES
U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, N.W.
Room 5614
Washington, D.C. 20530-0001
(202) 514-2217

On behalf of United States

Richard O. Cunningham, Esq.
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

On behalf of Corus Staal BV

JEFFREY D. GERRISH
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000

QUESTION PRESENTED

Whether the U.S. Court of Appeals for the Federal Circuit erred in upholding the Department of Commerce's use of the so-called "zeroing" methodology in calculating the margin of dumping for Corus Staal BV rather than remanding to Commerce based on a purported intervening change in that methodology.

PARTIES TO THE PROCEEDING

The parties to the proceeding are as follows: (1) the petitioner, Corus Staal BV, and (2) the respondents, the United States of America and United States Steel Corporation.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Respondent United States Steel Corporation does not have a parent company. In addition, no publicly held company owns 10% or more of United States Steel Corporation's stock.

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BRIEF OF RESPONDENT UNITED STATES STEEL CORPORATION IN OPPOSITION

Pursuant to United States Supreme Court Rule 15, Respondent United States Steel Corporation ("U.S. Steel") hereby submits this brief in opposition to the petition for a writ of certiorari filed by Petitioner Corus Staal BV ("Corus").

OPINIONS BELOW

The judgment of the U.S. Court of Appeals for the Federal Circuit (Pet. App. 2a) was entered without opinion on June 13, 2006 and is reported at 186 Fed. Appx. 997 (Fed. Cir. 2006). The order of the Federal Circuit denying the

petition for rehearing and rehearing en banc (Pet. App. 1a) is unreported.

The opinion of the U.S. Court of International Trade is reported at 387 F. Supp. 2d 1291 (Ct. Int'l Trade 2005) (Pet. App. 3a-27a).

JURISDICTION

The judgment of the U.S. Court of Appeals for the Federal Circuit was entered on June 13, 2006. Corus' petition for rehearing and rehearing en banc was denied on September 12, 2006. On November 30, 2006, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 25, 2007, and Corus' petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Statutory Framework Relating to Determinations of Dumping

The U.S. trade laws provide remedies to domestic industries that have been harmed by unfairly traded imports. In particular, the Tariff Act of 1930, as amended (the "Act"), provides for the imposition of antidumping duties where a domestic industry has been materially injured or threatened with material injury by imports of products sold at less than fair value (i.e., products that have been "dumped") in the United States. 19 U.S.C. § 1673 (2000). Section 731 of the Act provides for the imposition of antidumping duties "in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." *Id.* The "normal value" is typically the price at which the subject merchandise is sold in the home

market of the foreign producer or exporter whereas the "export price" or "constructed export price" is the price at which the subject merchandise is sold in the United States. *See id.* §§ 1677a(a), 1677b(a)(1)(B)(i).

The U.S. Department of Commerce ("Commerce") investigates whether dumping is occurring and establishes the level of antidumping duties to apply to imports. The International Trade Commission (the "ITC") determines whether a domestic industry has been materially injured or threatened with material injury by reason of unfairly traded imports. If both dumping and material injury are found in concurrent investigations conducted by Commerce and the ITC, an antidumping order is issued imposing antidumping duties on imports of the subject merchandise. *See id.* §§ 1673, 1673d(c)(2).

Thereafter, on an annual basis, Commerce may conduct administrative reviews of sales made by particular foreign producers or exporters of the merchandise subject to an antidumping order to determine a new antidumping duty rate for such producers or exporters. *See id.* § 1675(a)(1)(B). An administrative review covers a company's entries of subject merchandise during the relevant period of review. In an administrative review, Commerce uses its standard two-step procedure to calculate the company's weighted average dumping margin and antidumping duty rate.

In the first step, Commerce determines a "dumping margin" for each U.S. sale by comparing the price of such sale to the weighted average price of contemporaneous home market sales of the same or most similar product (i.e., the normal value). *See id.* § 1677f-1(d)(2). If the normal value is greater than the U.S. price, the comparison produces a positive number, establishing that dumping has occurred on

that sale. If the normal value is less than the U.S. price, the negative result indicates that the sale has been made at fair value and there is no dumping margin for that transaction.

In the second step of the margin calculation procedure, Commerce calculates the "weighted average dumping margin" for the foreign producer or exporter. *See id.* § 1677(35). In so doing, Commerce does not afford the foreign producer or exporter a "credit," or offset, for merchandise that was sold in the United States without dumping. It accomplishes this by aggregating the positive dumping margins determined in the first step (*i.e.*, the margins on sales where U.S. price is less than normal value and therefore dumping has occurred) and by setting to zero any so-called negative margins (*i.e.*, sales where U.S. price is greater than normal value). This is the methodology known as "zeroing." The sum of the positive dumping margins is then expressed as a percent of the total value of all U.S. transactions, including those for which no positive margin was obtained. This inclusion of the value of all such U.S. transactions has the effect of lowering the weighted average dumping margin because it increases the denominator. The weighted average dumping margin that is determined by Commerce in an administrative review serves as both the assessment rate for merchandise entered during the period of review and the cash deposit rate for new entries going forward. *See* 19 C.F.R. § 351.212 (2006).

Commerce's use of the zeroing methodology to calculate a company's weighted average dumping margin has been repeatedly upheld as reasonable by the U.S. Court of International Trade (the "CIT") and the U.S. Court of Appeals for the Federal Circuit. The CIT and the Federal Circuit have recognized that the use of zeroing produces more accurate results by combating the problem of masked

dumping. *See Timken Co. v. United States*, 354 F.3d 1334, 1343 (Fed. Cir. 2004), *cert. denied*, 543 U.S. 976 (2004) ("*Timken*"); *PAM, S.p.A. v. U.S. Dep't of Commerce*, 265 F. Supp. 2d 1362, 1371 (Ct. Int'l Trade 2003); *Serampore Industries Pvt., Ltd. v. U.S. Dep't of Commerce*, 675 F. Supp. 1354, 1360-61 (Ct. Int'l Trade 1987). As the Federal Circuit determined in *Timken*, zeroing "legitimately combats the problem of masked dumping, wherein certain profitable sales serve to 'mask' sales at less than fair value." *Timken*, 354 F.3d at 1343.

II. Statutory Framework Relating to the Treatment of the Uruguay Round Agreements and World Trade Organization Dispute Settlement Decisions

In 1994, the United States became a signatory and party to the Uruguay Round Agreements and, as a result, a Member of the World Trade Organization (the "WTO"). The Uruguay Round Agreements, including the Anti-Dumping Agreement and the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "WTO Dispute Settlement Understanding"), are not self-executing, and they have been implemented in U.S. law by the Uruguay Round Agreements Act (the "URAA").

In the URAA, Congress established detailed rules specifying how, if at all, the United States would respond to adverse decisions issued by WTO panels or the Appellate Body under the WTO Dispute Settlement Understanding. Section 123(g)(1) of the URAA expressly provides that where a WTO panel or the Appellate Body finds that a regulation or practice of an agency such as Commerce is inconsistent with one of the Uruguay Round Agreements, "that regulation or practice may not be amended, rescinded, or otherwise modified in the implementation of such report

unless and until" every one of six separate actions are taken. 19 U.S.C. § 3533(g)(1) (2000). These actions include consultations among Congress, the United States Trade Representative ("USTR"), and the agency in question, consultations with the relevant private sector advisory committees, submission of a report to the appropriate congressional committees, and provision of notice and an opportunity to comment on the proposed modification to the public. *Id.*

If a WTO panel or the Appellate Body finds that Commerce's determination in a particular case is inconsistent with one of the Uruguay Round Agreements, Section 129(b) of the URAA provides that USTR shall consult with Commerce and the appropriate congressional committees on the matter. *Id.* § 3538(b)(1). After such consultations, USTR may request Commerce to issue a determination to implement the WTO panel or Appellate Body report. *Id.* § 3538(b)(2). Before this determination may be implemented, USTR must consult again with Commerce and the appropriate congressional committees. *Id.* § 3538(b)(3). Thereafter, USTR "may" direct Commerce to implement its new determination "in whole or in part." *Id.* § 3538(b)(4).

Section 129(c)(1) of the URAA expressly provides that the implementation of an adverse WTO panel or Appellate Body report shall apply only with respect to "unliquidated entries of the subject merchandise . . . that are entered, or withdrawn from warehouse, for consumption on or after . . . the date on which the Trade Representative directs the administering authority . . . to implement that determination." *Id.* § 3538(c)(1). In this regard, U.S. law is fully in accordance with the general principle that WTO dispute settlement decisions apply prospectively only. As the Statement of Administrative Action (the "SAA")

approved by Congress in conjunction with the URAA[1] provides,

> [c]onsistent with the principle that [WTO] panel recommendations apply only prospectively, subsection 129(c)(1) provides that where determinations by the ITC or Commerce are implemented under subsections (a) or (b), such determinations have prospective effect only. That is, they apply to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which the Trade Representative directs implementation.

SAA at 1026, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4313.

Because WTO dispute settlement reports have prospective effect only, the SAA recognizes that "relief available under subsection 129(c)(1) is distinguishable from relief available in an action brought before a court or a NAFTA binational panel, where . . . retroactive relief may be available." *Id.* Moreover, the SAA provides that "[u]nder [Section] 129(c)(1), if implementation of a WTO report should result in the revocation of an antidumping or countervailing duty order, entries made prior to the date of [the] Trade Representative's direction would remain subject to potential duty liability." *Id.*

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[1] Congress has specifically directed that the URAA is to be interpreted and applied in accordance with the SAA. Indeed, by statute, Congress directed that the SAA must be regarded as "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d) (2000).

III. Administrative Proceedings Before Commerce

Commerce issued an antidumping order on hot-rolled carbon steel flat products from the Netherlands on November 29, 2001. *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 66 Fed. Reg. 59565 (Dep't Commerce Nov. 29, 2001) (order). At the request of U.S. Steel, Commerce initiated the administrative review of the antidumping order on certain hot-rolled carbon steel flat products from the Netherlands that is the subject of this litigation on December 26, 2002. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 67 Fed. Reg. 78772 (Dep't Commerce Dec. 26, 2002) (notice of initiation). The only company subject to the administrative review was Corus, the sole producer of hot-rolled steel in the Netherlands. *See id.*

Prior to the issuance of Commerce's final results in the administrative review, Corus filed a case brief challenging Commerce's use of zeroing to calculate the company's weighted average dumping margin. In the issues and decision memorandum adopted as part of its final results, Commerce rejected Corus' argument on zeroing. Issues and Decision Memorandum in *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 69 Fed. Reg. 33630 (Dep't Commerce June 16, 2004) (final results) at Comment 4. Commerce found that its use of zeroing had been repeatedly upheld by the CIT and the Federal Circuit as a reasonable interpretation of the antidumping statute. *Id.* Moreover, Commerce found Corus' reliance on certain WTO decisions relating to the issue of zeroing to be baseless. *See id.*

IV. Proceedings on Appeal

The CIT upheld Commerce's margin calculation methodology in its entirety. Relying on precedent from the Federal Circuit, the CIT held that Commerce's use of zeroing was based on a reasonable interpretation of the statute. Pet. App. 13a-14a. The CIT also rejected Corus' reliance on the United States' implementation of the WTO Appellate Body's decision in *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (Aug. 11, 2004) ("*Softwood Lumber*"). The CIT found that the Appellate Body's decision in *Softwood Lumber* only addressed zeroing "as applied" to the facts in that particular case and did not affect the zeroing methodology "as such." *Id.* at 16a.[2]

Further, the CIT concluded that even if the general methodology of zeroing had been challenged "as such" in *Softwood Lumber*, any implementation of the Appellate Body's decision in particular cases pursuant to Section 129 of the URAA would "only affect the unliquidated entries of subject merchandise that 'are entered, or withdrawn from warehouse, for consumption *on or after* . . . the date on which the Trade Representative directs the administering authority . . . to implement that determination." *Id.* (quoting 19 U.S.C. § 3538(c)(1)(A)) (emphasis in original). In other words, the CIT determined that any implementation of the

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[2] In the WTO dispute settlement system, claims asserted against a policy or practice "as applied" involve challenges based on the application of the policy or practice to the "specific set of facts" in a particular case. They are distinguished from "as such" claims which challenge a WTO Member's policy or practice in general in all cases. *See United States - Sunset Reviews of Anti-dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R (Nov. 29, 2004) at para. 6 and para. 6 n.22.

Softwood Lumber decision could only be applied prospectively under Section 129 of the URAA and, therefore, could not have any effect on the instant case. *Id.* at 16a-17a.

The U.S. Court of Appeals for the Federal Circuit affirmed in a *per curiam* decision issued on June 13, 2006. *Id.* at 2a. Corus thereafter submitted a petition for rehearing and rehearing en banc with respect to the issue of zeroing. The Federal Circuit rejected the petition and thereby once again upheld Commerce's use of zeroing on September 12, 2006. *Id.* at 1a.

V. Commerce's Modification of the Zeroing Methodology in Certain Antidumping Investigations

While the administrative review that is the subject of the instant case was pending before Commerce, the European Communities (the "EC") filed a WTO challenge against the use of zeroing in 15 antidumping investigations and 16 administrative reviews in *United States – Laws, Regulations and Methodology for Calculating Dumping Margins* ("*US – Zeroing (EC)*"). *See* Request for Consultations by the European Communities, *US – Zeroing (EC)*, WT/DS294/1 (June 19, 2003); Request for the Establishment of a Panel by the European Communities, *US – Zeroing (EC)*, WT/DS294/7/Rev. 1 (Feb. 19, 2004), Pet. App. 75a-104a. The investigation of hot-rolled steel from the Netherlands was one of the 15 investigations challenged by the EC. In contrast, the administrative review at issue here was not among the reviews subject to the EC's challenge. *See id.*

In its decision, the WTO Panel found Commerce's use of zeroing in antidumping investigations involving comparisons of weighted average normal values to weighted average U.S. prices to be inconsistent with the WTO Anti-Dumping Agreement, both "as such" in investigations generally and "as applied" in the 15 individual investigations that were challenged by the EC. *See* Report of the WTO Panel, *US – Zeroing (EC)*, WT/DS294/R (Oct. 31, 2005) ("Panel Report in *US – Zeroing (EC)*"), at paras. 8.1(a) and 8.1(c). However, the Panel upheld Commerce's use of zeroing in administrative reviews, both "as such" and "as applied." *See id.* at paras. 8.1(d)-(g). On appeal, the WTO Appellate Body reversed the Panel in finding the use of zeroing in administrative reviews to be inconsistent with the Anti-Dumping Agreement, but only "as applied" in the 16 particular administrative reviews challenged by the EC. *See* Report of the WTO Appellate Body, *US – Zeroing (EC)*, WT/DS294/AB/R (Apr. 18, 2006) ("Appellate Body Report in *US – Zeroing (EC)*"), at paras. 132-135, 263(a)(i). Again, the review at issue here was *not* one of those 16 reviews.

On March 6, 2006, Commerce issued a notice pursuant to Section 123 of the URAA requesting comments from the public on its proposal to implement the WTO Panel's decision in *US – Zeroing (EC)* with respect to the use of zeroing in antidumping investigations. *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Duty Investigation*, 71 Fed. Reg. 11189 (Dep't Commerce Mar. 6, 2006) (request for comments), Pet. App. 109a-113a. Thereafter, Commerce announced on December 27, 2006 that it would no longer use zeroing to calculate weighted average dumping margins in antidumping investigations involving comparisons of weighted average normal values to weighted average U.S. prices. *See Antidumping*

Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Duty Investigation, 71 Fed. Reg. 77722 (Dep't Commerce Dec. 27, 2006) (final modification) ("*Modification of Zeroing Methodology in Investigations*"), Pet. App. 114a-128a. In announcing this modification of its zeroing methodology pursuant to Section 123 of the URAA, Commerce clearly and unequivocally stated that the modification would apply only to the specified type of investigations (*i.e.*, investigations involving weighted average-to-weighted average comparisons). *Id.* at 77722, 77724, Pet. App. 114a, 117a.[3]

Thereafter, Commerce issued a preliminary determination under Section 129 of the URAA applying the modification of its zeroing methodology in the context of the individual antidumping investigations that were challenged by the EC in *US – Zeroing (EC)*, including the investigation on hot-rolled steel from the Netherlands. *See* Memorandum from Stephen Claeys to David Spooner Regarding Preliminary Results for the Section 129 Determinations: Certain Hot-Rolled Carbon Steel from the Netherlands, et al. (Feb. 26, 2007) at 3. Commerce issued its final determination in this Section 129 proceeding on April 9, 2007. *See* Memorandum from Stephen Claeys to David

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[3] In antidumping investigations, Commerce may calculate a company's weighted average dumping margin using one of three comparison methods depending on the circumstances of the case: (i) comparisons of weighted average normal values to weighted average U.S. prices; (ii) comparisons of weighted average normal values to individual U.S. transaction prices, or (iii) comparisons of individual normal value transaction prices to individual U.S. transaction prices. *See* 19 U.S.C. § 1677f-1(d)(1) (2000). Commerce's modification of its zeroing methodology pertains only to the first of these comparison methods (*i.e.*, the weighted average-to-weighted average comparison method).

Spooner Regarding Final Results for the Section 129 Determinations: Certain Hot-Rolled Carbon Steel from the Netherlands, et al. (Apr. 9, 2007) ("*Final Section 129 Determination*") at 23.

REASONS FOR DENYING THE PETITION

The Federal Circuit properly declined to remand the instant case to Commerce. Contrary to Corus' contentions, Commerce has not somehow abandoned or changed its policy with respect to the use of zeroing in all cases. The recently announced modification of Commerce's zeroing methodology to implement the WTO Panel's decision in *US – Zeroing (EC)* only relates to the use of zeroing in certain antidumping investigations. The modification clearly would *not* apply to any other type of antidumping proceeding, including administrative reviews like the review at issue here. Additionally, pursuant to the clear provisions of U.S. law, the modification announced by Commerce can be applied in the context of individual cases pursuant to Section 129 of the URAA on a prospective basis only. As a result, it cannot and will not affect previous administrative reviews like the review at issue here.

Thus, the decision of the Federal Circuit not to remand the instant case does not conflict with this Court's decision in *NLRB v. Food Store Employees Union* ("*Food Store Employees Union*") or with the decisions of the U.S. Court of Appeals for the D.C. Circuit following it. The Federal Circuit's decision also will not interfere with the United States' ability to comply with its international obligations in implementing the WTO decisions in *US – Zeroing (EC)*. Finally, the issue raised by Corus here is limited and unique in nature and is unlikely to arise in other contexts. For each of these reasons, review by this Court is

unwarranted and Corus' petition for a writ of certiorari should be denied.

I. The Federal Circuit's Decision Not to Remand the Instant Case to Commerce Does Not Conflict with the Decisions of this Court or the D.C. Circuit

Corus contends that the Court should grant certiorari because the decision of the Federal Circuit not to remand the instant case to Commerce conflicts with the decisions of this Court and the U.S. Court of Appeals for the D.C. Circuit. As demonstrated below, there is no such conflict and, as a result, there is no basis for review by this Court.

According to Corus, the Federal Circuit's refusal to remand the instant case to Commerce "violates clear precedent of this Court" and conflicts with the decisions of the D.C. Circuit following that precedent. Pet. 11, 13-19. In particular, Corus argues that the Federal Circuit's decision conflicts with this Court's decision in *Food Store Employees Union* and with the D.C. Circuit's decisions in *Williston Basin Interstate Pipeline Co. v. FERC* ("*Williston Basin*") and *Panhandle Eastern Pipe Line Co. v. FERC* ("*Panhandle*"). *See id.* However, a review of the pertinent facts in each of the cases in question shows clearly and conclusively that there is *no* conflict between these cases and the Federal Circuit's decision in the instant case that could possibly warrant review. Indeed, a review of the pertinent facts in those cases shows that they simply are not applicable here.

In *Food Store Employees Union*, this Court addressed the NLRB's abandonment of the policy *that served as the very basis for its determination in that particular case.* Specifically, pursuant to its policy in effect at the time that it

issued the decision under review in *Food Store Employees Union*, the NLRB refused to award litigation expenses to the complaining union for the unfair labor practices that had been engaged in by the offending employer. *See Food Store Employees Union*, 417 U.S. 1, 6 (1974). However, while the appeal of the NLRB's decision was pending before the D.C. Circuit, the NLRB changed its policy in favor of awarding such expenses. *Id.* at 6-7. After the D.C. Circuit affirmatively ordered that these expenses be awarded in the case under review based on the NLRB's change in policy, this Court reversed. *See id.* at 10-11. In so doing, this Court found that "a court reviewing an agency decision following an intervening change of policy by the agency should remand to permit the agency to decide in the first instance whether giving the change retrospective effect will best effectuate the policies underlying the agency's governing act." *Id.* at 10 n.10.

The D.C. Circuit thereafter followed the principle announced by this Court in *Food Store Employees Union* in issuing its decisions in *Williston Basin* and *Panhandle*. In *Williston Basin*, the D.C. Circuit found that during the pendency of the appeal in that case, the Federal Energy Regulatory Commission ("FERC") had "shifted course" and revised the methodology that it had employed in reaching the decision under appeal. *Williston Basin*, 165 F.3d 54, 61-62 (D.C. Cir. 1999). Under those circumstances, the court held that the case should be remanded to FERC to determine whether its revised methodology should be applied in that case. *Id.* at 62-63.

Likewise, in *Panhandle*, the D.C. Circuit determined that during the pendency of the appeal, FERC revised one of the "legal norms" on which its decision rested in that case. *Panhandle*, 890 F.2d 435, 436, 438 (D.C. Cir. 1989).

Relying on this Court's decision in *Food Store Employees Union*, the D.C. Circuit held that it should remand the case for further proceedings to determine how the change in policy should be applied. *Id.* at 438.

Corus' reliance on the decisions in *Food Store Employees Union*, *Williston Basin*, and *Panhandle* is plainly misplaced. In each of these cases, the courts merely held that where an agency abandons or revises a policy *that served as the very basis for its determination in the case*, the proper course is to remand to the agency for it to decide whether it should modify that determination based on the intervening policy change. *See Food Store Employees Union*, 417 U.S. at 6-7, 10; *Williston Basin*, 165 F.3d at 62-63; *Panhandle*, 890 F.2d at 438-39. As the D.C. Circuit recognized in *Panhandle*, a court is not at liberty under these circumstances either to evaluate the agency's determination under its "*old* policy" or to assess on its own how the matter would be resolved under the agency's "*new* policy." *Panhandle*, 890 F.2d at 438-39. Rather, the court is "required to remand so that the [agency] may indicate how, if at all, its decision would be affected by its intervening policy change." *Id.* at 439.

There is no conflict between the decisions in these cases and the decision of the Federal Circuit in the instant case. Here, there is no "old" and "new" policy with respect to the use of zeroing in administrative reviews. The policy remains the same as it was when Commerce issued its final results in the administrative review at issue in this case. Specifically, Commerce continues to use zeroing in all administrative reviews. Commerce's modification of its zeroing methodology makes *no* change in this regard. Indeed, in announcing the modification of its zeroing methodology, Commerce made absolutely clear that the

modification would apply *only* to investigations involving average-to-average comparisons and would *not* apply to any other types of investigations or any other segments of antidumping proceedings.[4] *See Modification of Zeroing Methodology in Investigations*, 71 Fed. Reg. at 77724, Pet. App. 122a. Thus, it would *not* apply to administrative reviews like the review at issue here.

In other words, contrary to Corus' contentions, it is clear beyond any doubt that Commerce's announced modification of its zeroing methodology will have *no* effect on the administrative review determination that is at issue in this case. Accordingly, the decisions in *Food Store Employees Union*, *Williston Basin*, and *Panhandle* are simply inapplicable.

Nevertheless, Corus claims that the application of Commerce's modification of its zeroing methodology to the investigation in the instant case pursuant to Section 129 of the URAA will likely lead to the revocation of the antidumping order. *See* Pet. 16-18. In turn, Corus contends that this would remove the legal authority for conducting the administrative review at issue in this appeal and would require the retroactive termination of the review. *See id.* at 7-8, 16-18. According to Corus,

> [t]he issues that remain unresolved – issues relating to the effect of that retrospective application of the changed policy to the validity of the antidumping proceeding, including the validity of the appealed review

[4] The segments of an antidumping proceeding include, *inter alia*, the antidumping investigation and each administrative review of the antidumping order.

> – are quintessentially the type of issues that both this Court and the D.C. Circuit have held must be decided by the agency and that require a remand.

Id. at 19. Under these circumstances, Corus argues that it was incumbent upon the Federal Circuit to remand this case to Commerce and that the Federal Circuit erred in failing to do so. *Id.* at 16, 19. Corus' arguments in this regard are fundamentally flawed and fly in the face of the standards governing the implementation of WTO decisions under U.S. law. They should, therefore, be rejected.

In fact, in making its arguments, Corus assumes that any implementation of the WTO Panel's decision in *US – Zeroing (EC)* pursuant to Section 129 of the URAA will be applied retroactively so as to affect the review at issue here. However, this simply is *not* the case.

Under the express provisions of Section 129 of the URAA and the SAA, WTO dispute settlement decisions have prospective effect only. 19 U.S.C. § 3538(c)(1); SAA at 1026, *reprinted in* 1994 U.S.C.C.A.N. at 4313. Thus, those decisions may *not* be applied retroactively to entries of merchandise into the United States that are made and administrative reviews that are conducted before they are implemented. As the SAA plainly states, Section 129 determinations to implement adverse WTO decisions "*have prospective effect only.* That is, they apply to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption *on or after the date on which the Trade Representative directs implementation.*" SAA at 1026, *reprinted in* 1994 U.S.C.C.A.N. at 4313 (emphasis added). This is just as true where an antidumping order is revoked as a result of a Section 129 determination as it is in

other contexts. In this regard, the SAA specifically provides that "[u]nder [Section] 129(c)(1), if implementation of a WTO report should result in the revocation of an antidumping or countervailing duty order, entries made prior to the date of [the] Trade Representative's direction would remain subject to potential duty liability." *Id.*

This is precisely the way in which Commerce has applied Section 129 of the URAA in previous cases. Commerce has made quite clear in such cases that actions taken or changes made to comply with a WTO panel or Appellate Body decision apply only to subject merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which USTR directs Commerce to implement its determination under Section 129. *See, e.g.*, *Notice of Implementation Under Section 129 of the Uruguay Round Agreements Act; Countervailing Measures Concerning Certain Steel Products from the European Communities*, 68 Fed. Reg. 64858, 64859 (Dep't Commerce Nov. 17, 2003) (Section 129 Determ.) ("*Privatization Section 129 Determination*"); *Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measure on Certain Cut-to-Length Carbon-Quality Steel Plate Products from India*, 68 Fed. Reg. 7967, 7976 (Dep't Commerce Feb. 19, 2003) (Section 129 Determ.); *Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan*, 67 Fed. Reg. 71936, 71937, 71939 (Dep't Commerce Dec. 3, 2002) (Section 129 Determ.) ("*Japan Hot-Rolled Section 129 Determination*").

Indeed, in the *Japan Hot-Rolled Section 129 Determination*, Commerce addressed an issue that was also on appeal before the Federal Circuit and, in so doing,

modified the antidumping duty rate for the respondent involved in that appeal. In response to concerns about the effect that the Section 129 determination could have on the Federal Circuit appeal, Commerce clearly and unequivocally stated that "this new determination, pursuant to section 129 of the URAA . . . , does not render moot the federal court appeal currently pending with respect to the antidumping duty order on hot-rolled steel." *Japan Hot-Rolled Section 129 Determination*, 67 Fed. Reg. at 71937. As Commerce explained, the Section 129 determination applied only to entries made after its effective date and did not affect prior entries subject to the appeal pending before the Federal Circuit. *Id.* Accordingly, Commerce recognized that its implementation of the WTO decision at issue in that case under Section 129 would not and could not affect prior entries.

Moreover, Commerce followed its practice of implementing WTO decisions with regard to future, rather than past, entries in the only case in which a final Section 129 determination resulted in the revocation of an order. *See Privatization Section 129 Determination*, 68 Fed. Reg. at 64859. In its *Privatization Section 129 Determination*, Commerce revoked two countervailing duty orders[5] in whole and revoked another order with respect to a particular company as the result of the application of its new privatization methodology. *See id.* However, the revocation of the orders in those cases was made effective only with

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[5] Countervailing duty orders impose duties on foreign producers and exporters found to have benefited from improper subsidization by a foreign government. Countervailing duty proceedings have the same structure and present the same implementation issues as antidumping proceedings. Indeed, Corus itself has acknowledged that there is no material difference in the implementation issues presented by the two types of proceedings. *See* Pet. 24 n.16.

respect to future entries of the subject merchandise. *Id.* In other words, merchandise entered prior to the effective date of Commerce's Section 129 determination remained subject to countervailing duties. Assuming, *arguendo*, that the implementation of the WTO Panel's decision in *US – Zeroing (EC)* results in the revocation of the antidumping order on hot-rolled steel from the Netherlands, the revocation should likewise be made effective *only* with respect to future entries of the subject merchandise.

Despite the foregoing, Corus contends that it is somehow unclear as to how past entries of the subject merchandise are to be treated where Commerce implements a WTO decision through Section 129 of the URAA. *See* Pet. 9-10. This contention is simply devoid of merit. In fact, this contention ignores the plain language of Section 129, the SAA, and the Department's practice on this issue. These authorities conclusively establish that the implementation of WTO decisions through Section 129 is *only to apply prospectively to future entries of the subject merchandise* and, therefore, necessarily does *not* apply to past entries.

Corus is also wrong in relying on the CIT's decision in *Jilin Henghe Pharm. Co. v. United States* for the proposition that once Commerce's dumping determination is invalidated, it cannot serve as a legal basis for the imposition of antidumping duties. Pet. 18. Indeed, Corus' reliance on that U.S. court decision flatly disregards the clear distinction made in the SAA between implementation of WTO reports under Section 129 of the URAA and the relief available before the U.S. courts. As the SAA clearly states, "relief available under subsection 129(c)(1) is distinguishable from relief available in an action brought before a court or a NAFTA binational panel, where . . . retroactive relief may be available." SAA at 1026, *reprinted in* 1994 U.S.C.C.A.N. at

4313. In other words, there is no basis for comparison between a Section 129 determination and the relief available before the U.S. courts.

Lacking support anywhere in U.S. law for its arguments, Corus relies most heavily on a statement made by the United States in the course of the WTO dispute settlement proceeding commenced by Canada to challenge Section 129 of the URAA. *See* Pet. 10-11, 18. Specifically, Corus relies on the following statement made by the U.S. government in the course of that proceeding:

> The second scenario that Canada has raised is a situation where the WTO challenge results in the revocation of an antidumping or countervailing duty order because the new, WTO-consistent determination results in a finding of no injury, no dumping, or no subsidization. Under the terms of section 129(c)(1), the revocation would apply to all entries which took place on or after the date of revocation of the order, so Commerce would instruct the U.S. Customs Service to stop requiring cash deposits as of that date. *In any subsequent administrative review, Commerce would need to decide what to do with respect to entries that took place prior to the date of revocation.*

Second Written Submission of the United States, *United States – Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221 (Mar. 8, 2002) at para. 19, Pet. App. 139a-140a (emphasis added).

This statement provides no support for Corus' contentions. Even assuming the accuracy of the statement, it simply explains that in an administrative review conducted *subsequent to* the implementation of an adverse WTO decision pursuant to Section 129 of the URAA, Commerce would have to decide how to treat entries subject to the review that were made prior to the date of revocation. This does not change the fact that Commerce's implementation of a WTO decision may *not* affect prior entries subject to *previously conducted administrative reviews* in a particular case.

Indeed, this is precisely the position taken by Commerce in its *Final Section 129 Determination* to implement the WTO Panel decision in *US – Zeroing (EC)* and by the U.S. government in each of Corus' appeals to the U.S. courts from the administrative reviews of the antidumping order in this case, including the review at issue here. Specifically, in the *Final Section 129 Determination*, Commerce specifically stated that it "disagrees that any revocations that result from these section 129 proceedings apply to entries made prior to the implementation date," including entries subject to prior administrative reviews like the review at issue here. *Final Section 129 Determination* at 16. Commerce also concluded that "pursuant to the statute and the SAA, any revocations resulting from these section 129 proceedings will not apply to entries made before the date of USTR's direction." *Id.* at 17.

Moreover, in Corus' appeals of the administrative reviews conducted by Commerce in this case, the U.S. government has stated to the CIT and the Federal Circuit that the implementation of the WTO decisions in *US – Zeroing (EC)* and even the revocation of the order as part of that implementation could not possibly affect the entries subject

to those reviews. As the U.S. government stated in its brief submitted to the Federal Circuit in the instant case,

> even if USTR ultimately were to instruct Commerce to implement a new determination that resulted in the revocation of the antidumping order on hot-rolled steel from the Netherlands as a result of the conclusion of the dispute in *US – Zeroing*, . . . *that implementation would have no effect upon the entries in this appeal, but could only be applied prospectively.*

Brief of Defendant-Appellee United States in *Corus Staal BV v. United States*, Federal Circuit Court No. 05-1600 (Feb. 9, 2006) ("U.S. Brief in *Corus Staal*") at 21 (citing 19 U.S.C. § 3538(c)(1)) (emphasis added).

Thus, the U.S. government could not have been any clearer or emphatic in its statements regarding this issue and how it affects the instant case. As the U.S. government has plainly stated, any implementation of the WTO decisions in *US – Zeroing (EC)* could only be applied prospectively and would not have any effect on previous entries of the subject merchandise and previously conducted administrative reviews like the review in question here.

The bottom line is that the administrative review at issue in the instant case could not possibly be affected by the WTO Panel's decision in *US – Zeroing (EC)* because any implementation of that decision must be done on a prospective basis only. As a result, the Federal Circuit's decision not to grant a remand to Commerce in the instant case is consistent with the decisions of this Court and the

D.C. Circuit. There is no basis for further review, and Corus' petition for a writ of certiorari should be rejected.

II. The Federal Circuit's Decision Does Not Interfere with the United States' Ability to Comply with Its International Obligations

Corus next argues that because the United States has obligated itself to implement the WTO's decisions in *US – Zeroing (EC)*, it is "particularly important" for the instant case to be remanded to Commerce. *See* Pet. 19. In this regard, Corus offers three reasons why it believes a remand is important here:

> First, such a remand is consistent with the congressionally-mandated implementation regime for adverse WTO reports. This statutory regime places the responsibility for implementation squarely in the Executive Branch. . . . Second, such a remand comports with the constitutional separation of powers which recognizes the sole competency of the Executive Branch in conducting the foreign affairs of the United States. . . . Finally, such a remand also comports with general principles of administrative law which recognize the importance of allowing agencies primary jurisdiction to determine how to conduct agency proceedings.

Id. at 19-20 (citations omitted). Corus is wrong on each of these counts.

First, a remand is not necessary to comply with the "congressionally-mandated implementation regime for

adverse WTO reports." *See id.* at 19. To the contrary, Commerce and USTR have already acted to implement the WTO Panel's "as such" decision in *US – Zeroing (EC)* through a modification of the zeroing methodology pursuant to Section 123 of the URAA. In addition, Commerce has applied the modification of its zeroing methodology in the individual investigations challenged "as applied" by the EC pursuant to Section 129 of the URAA. Thus, the statutory regime for implementing WTO decisions has been followed here, and there is no need for a remand.

Moreover, Corus' arguments regarding the "sole competency of the Executive Branch in conducting the foreign affairs of the United States" and the need to allow agencies "primary jurisdiction to determine how to conduct agency proceedings" are simply irrelevant. *See id.* at 20. Here, there has been *no* interference with the Executive Branch's ability to exercise its foreign affairs powers or with Commerce's ability to conduct its proceedings. Rather, Commerce and USTR have exercised full control over the implementation of the WTO decisions in *US – Zeroing (EC)* and have not been constrained by the Federal Circuit or any other entity in their ability to implement those decisions. Indeed, the Executive Branch has not complained, in any way, about limits on its power or ability to conduct its proceedings and has not sought a remand so as to implement *US – Zeroing (EC)* in the instant case. To the contrary, the Executive Branch has made clear that a remand is neither necessary nor appropriate in the instant case because the implementation of *US – Zeroing (EC)* will be done on a prospective basis only and could not possibly affect the administrative review at issue here. *See Final Section 129 Determination* at 16-17; U.S. Brief in *Corus Staal* at 21. For this reason as well, there is no basis for a remand.

There likewise is no basis for Corus' assertion that "[t]he issues inherent to revoking an antidumping order in response to an adverse WTO report, particularly whether such a revocation will reach previously entered but unliquidated entries, have never been resolved by the Executive Branch." Pet. 22. This assertion ignores the fact that Commerce addressed and resolved such issues in its *Privatization Section 129 Determination*. Specifically, although Commerce revoked three countervailing duty orders, in whole or in part, in that proceeding, the revocation of the orders was made effective only with respect to future entries of the subject merchandise.[6] *Privatization Section 129 Determination*, 68 Fed. Reg. at 64859. Thus, merchandise that entered prior to the effective date of Commerce's determination remained subject to countervailing duties.

Corus' argument on this point also disregards the SAA's instruction that if an antidumping or countervailing duty order is revoked as a result of a Section 129 determination implementing an adverse WTO report, entries made prior to the effective date of the Section 129 determination remain subject to duties. SAA at 1026, *reprinted in* 1994 U.S.C.C.A.N. at 4313. Corus' entries in the administrative review at issue here fall squarely within this rule. They should, therefore, be subject to duties even if the antidumping order is revoked.

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[6] As noted above, although Commerce's *Privatization Section 129 Determination* involved the revocation of *countervailing duty*, rather than *antidumping*, orders, the same implementation issues arise with respect to both types of proceedings. Accordingly, there is no basis for distinction between the two here.

Lastly, Corus claims that "if the United States is unable to reach previously entered but unliquidated entries in implementing *U.S.-Zeroing*, the United States may be in violation of its international obligations under the WTO Agreements." Pet. 22. This contention simply does not comport with the facts. Indeed, under both U.S. law and the WTO Agreements, WTO dispute settlement decisions like the ones in *US – Zeroing (EC)* only apply prospectively. SAA .at 1026, *reprinted in* 1994 U.S.C.C.A.N. at 4313. Accordingly, the United States clearly will not be in violation of its international obligations simply because its implementation of *US – Zeroing (EC)* does not reach prior entries of the subject merchandise. To the contrary, the United States will be in complete accordance with its obligations based on the prospective nature of its implementation.

In sum, Corus' arguments regarding the need for a remand in the instant case to enable the United States to comply with its international obligations should be rejected. Such arguments are devoid of merit and certainly do not offer any basis to justify this Court's review.

III. Corus' Contention that a Remand is of Great Importance Because of the Likelihood that the Issue Presented Here Will Arise in Other Cases Is Without Basis

Corus contends that it is particularly important for this Court to grant its petition for a writ of certiorari here because the issue it raises regarding the need for a remand is likely to arise again in other cases both within and beyond the international trade context. *See* Pet. 23-27. However, Corus' discussion regarding the importance of this issue is simply baseless.

In an attempt to demonstrate the importance of the issue that it presents, Corus argues that the issue is likely to arise again not only in appeals involving determinations issued by Commerce and the ITC in antidumping and countervailing duty cases, but also in "numerous other appeals involving agency action and agency policies . . . ." Pet. 25. In this regard, Corus asserts that the issue could arise in appeals of other matters heard by the Federal Circuit, including determinations of the U.S. Patent and Trademark Office, the Merit Systems Protection Board, and agency boards of contract appeals. *Id.* at 26. Corus is flatly wrong.

In fact, the issue raised by Corus here arises out of and is inherently linked to the specialized process for the implementation of WTO decisions established by Section 129 of the URAA. *See id.* at 9-11, 17-19, 24. However, the statutory process established by Section 129 is limited, on its face, *solely* to the implementation *by Commerce and the ITC* of WTO decisions involving *antidumping and countervailing duty matters*. 19 U.S.C. § 3538. In other words, the statutory process cannot possibly have *any* application outside of such matters, and, as a result, the issue raised by Corus is likewise limited to such matters..

Not only is it impossible for the issue that Corus presents to arise outside of the international trade context, it is even unlikely to arise in other antidumping and countervailing duty cases. Indeed, the issue that Corus presents is based on a unique confluence of factors. Specifically, it would arise only where (i) an appeal of the original antidumping investigation in a case is brought at the WTO; (ii) an administrative review conducted by Commerce in that same case is appealed to the U.S. courts; (iii) while the appeal of the administrative review is pending, the WTO

issues an adverse decision with respect to the original investigation in the case; and (iv) while the appeal of the administrative review is still pending, Commerce implements the WTO's adverse decision and that implementation results in the revocation of the antidumping order. Under these circumstances, Corus contends that Commerce would have to determine how the revocation of the order affects the legal status of the administrative review at issue and the entries subject to that review. *See* Pet. 9-11, 17-19, 24. However, this precise confluence of circumstances is highly unusual. It has not arisen in any prior case and is not likely to arise in more than a few, isolated instances in the future. Thus, contrary to Corus' contentions, the issue presented in the instant case plainly is not an issue that merits this Court's review.

CONCLUSION

For all of the reasons set forth above, Corus' petition for a writ of certiorari should be denied.

Respectfully submitted,

Robert E. Lighthizer
John J. Mangan
Counsel of Record
Jeffrey D. Gerrish
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111
(202) 371-7000
Counsel for Respondent
United States Steel Corporation

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APPENDIX

19 C.F.R. § 351.212 Assessment of antidumping and countervailing duties; provisional measures deposit cap; interest on certain overpayments and underpayments

(a) *Introduction.* Unlike the systems of some other countries, the United States uses a "retrospective" assessment system under which final liability for antidumping and countervailing duties is determined after merchandise is imported. Generally, the amount of duties to be assessed is determined in a review of the order covering a discrete period of time. If a review is not requested, duties are assessed at the rate established in the completed review covering the most recent prior period or, if no review had been completed, the cash deposit rate applicable at the time merchandise was entered. This section contains rules regarding the assessment of duties, the provisional measures deposit cap, and interest on over- or undercollections of estimated duties.

(b) *Assessment of antidumping and countervailing duties as the result of a review—(1) Antidumping duties.* If the Secretary has conducted a review of an antidumping order under § 351.213 (administrative review), § 351.214 (new shipper review), or § 351.215 (expedited antidumping review), the Secrete normally will calculate an assessment rate for each importer of subject merchandise covered by the review. The Secretary

normally will calculate the assessment rate by dividing the dumping margin found on the subject merchandise examined by the entered value of such merchandise for normal customs duty purposes. The Secretary then will instruct the Customs Service to assess antidumping duties by applying the assessment rate to the entered value of the merchandise.

(2) *Countervailing duties.* If the Secretary has conducted a review of a countervailing duty order under § 351.213 (administrative review), or § 351.214 (new shipper review), the Secretary normally will instruct the Customs Service to assess countervailing duties by applying the rates included in the final results of the review to the entered value of the merchandise.

(c) *Automatic Assessment of antidumping and countervailing duties if no review is requested.* (1) If the Secretary does not receive a timely request for an administrative review of an order (see paragraph (b)(1), (b)(2), or (b)(3) of § 351.213), the Secretary, without additional notice, will instruct the Customs Service to:

(i) Assess antidumping duties or countervailing duties, as the case may be, on the subject merchandise described in § 351.213(e) at rates equal to the cash deposit of, or bond for, estimated antidumping duties or countervailing

duties required on that merchandise at the time of entry, or withdrawal from warehouse, for consumption; and

(ii) to continue to collect the cash deposits previously ordered.

(2) If the Secretary receives a timely request for an administrative review of an order (see paragraph (b)(1), (b)(2), or (b)(3) of § 351.213), the Secretary will instruct the Customs Service to assess the antidumping duties or countervailing duties, and to continue to collect cash deposits, on the merchandise not covered by the request in accordance with paragraph (c)(1) of this section.

(3) The automatic assessment provisions of paragraphs (c)(1) and (c)(2) of this section will not apply to subject merchandise that is the subject of a new shipper review (see § 351.214) or an expedited antidumping review (see § 351.215).

(d) *Provisional measures deposit cap.* This paragraph applies to subject merchandise entered, or withdrawn from warehouse, for consumption before the dare of publication of the Commissions notice of an affirmative final injury determination or, in a countervailing duty proceeding that involves merchandise from a country that is not entitled to an injury test, the date of the Secretary's notice of an affirmative final countervailing duty determination.

If the amount of duties that would be assessed by applying the rates included in the Secretary's affirmative preliminary or affirmative final antidumping or countervailing duty determination ("provisional duties") is different from the amount of duties that would be assessed by applying the assessment rate under paragraphs (b)(1) and (b)(2) of the section ("final duties"), the Secretary will instruct the Customs Service to disregard the difference to the extent that the provisional duties are less than the final duties, and to assess antidumping or countervailing duties at the assessment rate if the provisional duties exceed the final duties.

(e) *Interest on certain overpayments and underpayments.* Under section 778 of the Act, the Secretary will instruct the Customs service to calculate the interest for each entry on or after the publication of the order from the date that a cash deposit is required to be deposited for the entry through the date of liquidation of the entry.

(f) *Special rule for regional industry cases*—(1) *In general.* If the Commission, in its final injury determination, found a regional industry under section 771(4)(C) of the Act, the Secretary may direct that duties not be assessed on subject merchandise of a particular exporter or producer if the Secretary determines that:

(i) The exporter or producer did not export subject merchandise for sale in the region concerned during or after the Department's period of investigation;

(ii) The exporter or producer has certified that it will not export subject merchandise for sale in the region concerned in the future so long as the antidumping or countervailing duty order is in effect; and

(iii) No subject merchandise of the exporter or producer was entered into the United States outside of the region and then sold into the region during or after the Department's period of investigation.

(2) *Procedures for obtaining an exception from the assessment of duties*—(i) *Request for exception.* An exporter or producer seeking an exception from the assessment of duties under paragraph (f)(1) of this section must request, subject to the provisions of § 351.213 or § 351.214, and administrative review or new shipper review to determine whether subject merchandise of the exporter or producer in question should be excepted from the assessment of duties under paragraph (f)(1) of this section. The exporter or producer making the request may request that the review be limited to a determination as to whether the requirements of

paragraph (f)(1) of this section are satisfied. The request for a review must be accompanied by:

(A) A certification by the exporter or producer that it did not export subject merchandise for sale in the region concerned during or after the Department's period of investigation, and that it will not do so in the future so long as the antidumping or countervailing duty order is in effect; and

(B) A certification from each of the exporter's or producer's U.S. imports of the subject merchandise that no subject merchandise of that exporter or producer was entered into the United States outside such region an then sold into the region during or after the Department's period of investigation.

(ii) *Limited review.* If the Secretary initiates an administrative review or a new shipper review based on a request for review that includes a request for an exception from the assessment of duties under paragraph (f)(2)(i) of this section, the Secretary, if requested, may limit the review to a determination as to whether an exception from the assessment of duties should be granted under paragraph (f)(1) of this section.

(3) *Exception granted.* If, in the final results of the administrative review or the new shipper

review, the Secretary determines that the requirements of paragraph (f)(1) of this section are satisfied, the Secretary will instruct the Customs Service to liquidate, without regard to antidumping or countervailing duties (whichever is appropriate), entries of subject merchandise of the exporter or producer concerned.

(4) *Exception not granted.* If, in the final results of the administrative review or the new shipper review, the Secretary determines that the requirements of paragraph (f)(1) are not satisfied, the Secretary:

(i) Will issue assessment instructions to the Customs Service in accordance with paragraph (b) of this section; or

(ii) If the review was limited to a determination as to whether an exception from the assessment of duties should be granted, the Secretary will instruct the Customs Service to assess duties in accordance with paragraph (f)(1) or (f)(2) of this section, whichever is appropriate (automatic assessment if no review is requested).

* * * *

19 U.S.C. § 1673. Imposition of antidumping duties

If—

(1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and

(2) the Commission determines that—

(A) an industry in the United States—

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded,

by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,

then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty

imposed, in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise. For purposes of this section and section 1673d(b)(1) of this title, a reference to the sale of foreign merchandise includes the entering into of any leasing arrangement regarding the merchandise that is equivalent to the sale of the merchandise.

* * * *

19 U.S.C. § 1673d. Final determinations

* * * *

(c) Effect of final determinations

* * * *

(2) Issuance of order; effect of negative determination

If the determinations of the administering authority and the Commission under subsections (a)(1) and (b)(1) of this section are affirmative, then the administering authority shall issue an antidumping duty order under section 1673e(a) of this title. If either of such determinations is negative, the investigation shall be terminated upon the publication of notice of that negative determination and the administering authority shall—

(A) terminate the suspension of liquidation under section 1673b(d)(2) of this title, and

(B) release any bond or other security, and refund any cash deposit, required under section 1673b(d)(1)(B) of this title.

* * * *

19 U.S.C. § 1675. Administrative review of determinations

(a) Periodic review of amount of duty

(1) In general

At least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order under this subtitle or under section 1303 of this title, an antidumping duty order under this subtitle or a finding under the Antidumping Act, 1921, or a notice of the suspension of an investigation, the administering authority, if a request for such a review has been received and after publication of notice of such review in the Federal Register, shall—

* * * *

(B) review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty, and

* * * *

19 U.S.C. § 1677a. Export price and constructed export price

(a) Export price

The term "export price" means the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under subsection (c) of this section.

* * * *

19 § 1677b. Normal value

(a) Determination

In determining under this subtitle whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value. In order to achieve a fair comparison with the export price or constructed export price, normal value shall be determined as follows:

(1) Determination of normal value

* * * *

(B) Price

The price referred to in subparagraph (A) is-

(i) the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the

ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price, or

* * * *

19 § 1677f-1. Sampling and averaging; determination of weighted average dumping margin and countervailable subsidy rate

* * * *

(d) Determination of less than fair value

(1) Investigations

(A) In general

In an investigation under part II of this subtitle, the administering authority shall determine whether the subject merchandise is being sold in the United States at less than fair value—

(i) by comparing the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise, or

(ii) by comparing the normal values of individual transactions to the export prices (or constructed export prices) of individual transactions for comparable merchandise.

(B) Exception

The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if—

> **(i)** there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
>
> **(ii)** the administering authority explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).

(2) Reviews

In a review under section 1675 of this title, when comparing export prices (or constructed export prices) of individual transactions to the weighted average price of sales of the foreign like product, the administering authority shall limit its averaging of prices to a period not exceeding the

calendar month that corresponds most closely to the calendar month of the individual export sale.

* * * *

19 U.S.C. § 1677 Definitions; special rules

* * * *

(35) Dumping margin; weighted average dumping margin

(A) Dumping margin

The term "dumping margin" means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.

(B) Weighted average dumping margin

The term "weighted average dumping margin" is the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer.

(C) Magnitude of the margin of dumping

The magnitude of the margin of dumping used by the Commission shall be-

(i) in making a preliminary determination under section 1673b(a) of this title in an investigation (including any investigation in which the Commission cumulatively assesses the volume and effect of imports under paragraph (7)(G)(i)), the dumping margin or margins published by the administering authority in its notice of initiation of the investigation;

(ii) in making a final determination under section 1673d(b) of this title, the dumping margin or margins most recently published by the administering authority prior to the closing of the Commission's administrative record;

(iii) in a review under section 1675(b)(2) of this title, the most recent dumping

margin or margins determined by the administering authority under section 1675a(c)(3) of this title, if any, or under section 1673b(b) or 1673d(a) of this title; and

(iv) in a review under section 1675(c) of this title, the, dumping margin or margins determined by the administering authority under section 1675a(c)(3) of this title.

* * * *

19 U.S.C. § 3512. Relationship of agreements to United States law and State law

* * * *

(d) Statement of administrative action

The statement of administrative action approved by the Congress under section 3511(a) of this title shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.

* * * *

19 U.S.C. § 3533 Dispute settlement panels and procedures

* * * *

(g) Requirements for agency action

(1) Changes in agency regulations or practice

In any case in which a dispute settlement panel or the Appellate Body finds in its report that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements, that regulation or practice may not be amended, rescinded, or otherwise modified in the implementation of such report unless and until—

(A) the appropriate congressional committees have been consulted under subsection (f) of this section;

(B) the Trade Representative has sought advice regarding the modification from relevant private sector advisory committees established under section 2155 of this title;

(C) the head of the relevant department or agency has provided an opportunity for public comment by publishing in the Federal Register the proposed modification and the explanation for the modification;

(D) the Trade Representative has submitted to the appropriate congressional committees a report describing the proposed modification, the reasons for the modification, and a summary of the advice obtained under subparagraph (B) with respect to the modification;

(E) the Trade Representative and the head of the relevant department or agency have consulted with the appropriate congressional committees on the proposed contents of the final rule or other modification; and

(F) the final rule or other modification has been published in the Federal Register.

* * * *

19 U.S.C. § 3538 Administrative action following WTO Panel Reports

(a) Action by United States International Trade Commission

(1) Advisory Report

If a dispute settlement panel finds in an interim report under Article 15 of the Dispute Settlement Understanding, or the Appellate Body finds in a Report under Article 17 of that Understanding, that an action by the International Trade Commission in connection with a particular proceeding is not in conformity with the obligations of the United States under the Antidumping Agreement, the Safeguards Agreement, or the Agreement on Subsidies and Countervailing Measures, the Trade Representative may request the Commission to issue an advisory Report on whether title VII of the Tariff Act of 1930 [19 U.S.C.A. § 1671 et seq.] or title II of the Trade Act of 1974 [19 U.S.C.A. § 2251 et seq.], as the case may be, permits the Commission to take steps in connection with the particular proceeding that would render its action not inconsistent with the findings of the panel or the Appellate Body concerning those obligations. The Trade Representative shall notify the congressional committees of such request.

(2) Time Limits for Report

The commission shall transmit its report under paragraph (1) to the Trade Representative—

(A) in the case of an interim report described in paragraph (1), within 30 calendar days after the Trade Representative requests the report; and

(B) in the case of a report of the Appellate Body, within 21 calendar days after the Trade Representative requests the report.

(3) Consultations on request for Commission determination

If a majority of the Commissioners issues an affirmative report under paragraph (1), the Trade Representative shall consult with the congressional committees concerning the matter.

(4) Commission determination

Notwithstanding any provision of the Tariff Act of 1930 [19 U.S.C.A. § 1202 et seq.] or title II of the Trade Act of 1974 [19 U.S.C.A. § 2251 et seq.], if a majority of the Commissioners issues an affirmative report under paragraph (1), the Commission, upon the written request of the Trade Representative, shall issue a determination in connection with the

particular proceeding that would render the Commission's actions described in paragraph (1) not inconsistent with the findings of the panel or Appellate Body. The Commission shall issue its determination not later than 120 days after the request from the Trade Representative is made.

(5) Consultations on implementation of Commission determination

The Trade Representative shall consult with the congressional committees before the Commission's determination under paragraph (4) is implemented.

(6) Revocation of order

If, by virtue of the Commission's determination under paragraph (4), an antidumping or countervailing duty order with respect to some or all of the imports that are subject to the action of the Commission described in paragraph (1) is no longer supported by an affirmative Commission determination under title VII of the Tariff Act of 1930 [19 U.S.C.A. § 1671 et seq.] or this subsection, the Trade Representative may, after consulting with the congressional committees under paragraph (5), direct the administering authority to revoke the antidumping or countervailing duty order in whole or in part.

(b) Action by administering authority

(1) Consultations with administering authority and congressional committees

Promptly after a report by a dispute settlement panel or the Appellate Body is issued that contains findings that an action by the administering authority in a proceeding under title VII of the Tariff Act of 1930 [19 U.S.C.A. § 1671 et seq.] is not in conformity with the obligations of the United States under the Antidumping Agreement or the Agreement on Subsidies and Countervailing Measures, the Trade Representative shall consult with the administering authority and the congressional committees on the matter.

(2) Determination by administering authority

Notwithstanding any provision of the Tariff Act of 1930 [19 U.S.C.A. § 1202 et seq.], the administering authority shall, within 180 days after receipt of a written request from the Trade Representative, issue a determination in connection with the particular proceeding that would render the administering authority's action described in paragraph (1) not inconsistent with the findings of the panel or the Appellate Body.

(3) Consultations before implementation

Before the administering authority implements any determination under paragraph (2), the Trade Representative shall consult with the administering authority and the congressional committees with respect to such determination.

(4) Implementation of determination

The Trade Representative may, after consulting with the administering authority and the congressional committees under paragraph (3), direct the administering authority to implement, in whole or in part, the determination made under paragraph (2).

(c) Effects of determinations; notice of implementation

(1) Effects of determinations

Determinations concerning title VII of the Tariff Act of 1930 [19 U.S.C.A. § 1671 et seq.] that are implemented under this section shall apply with respect to unliquidated entries of the subject merchandise (as defined in section 771 of that Act [19 U.S.C.A. § 1677]) that are entered, or withdrawn from warehouse, for consumption on or after—

(A) in the case of a determination by the Commission under subsection (a)(4) of this section, the date on which the Trade Representative directs the administering authority under subsection (a)(6) of this section to revoke an order pursuant to that determination, and

(B) in the case of a determination by the administering authority under subsection (b)(2) of this section, the date on which the Trade Representative directs the administering authority under subsection (b)(4) of this section to implement that determination.

(2) Notice of implementation

(A) The administering authority shall publish in the Federal Register notice of the implementation of any determination made under this section with respect to title VII of the Tariff Act of 1930 [19 U.S.C.A. § 1671 et seq.].

(B) The Trade Representative shall publish in the Federal Register notice of the implementation of any determination made under this section with respect to title II of the Trade Act of 1974 [19 U.S.C.A. § 2251 et seq.].

(d) Opportunity for comment by interested parties

Prior to issuing a determination under this section, the administering authority or the Commission, as the case may be, shall provide interested parties with an opportunity to submit written comments and, in appropriate cases, may hold a hearing, with respect to the determination.

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THE URUGUAY ROUND AGREEMENTS ACT STATEMENT OF ADMINISTRATIVE ACTION

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(3) Effect of Determinations

Consistent with the principle that GATT panel recommendations apply only prospectively, subsection 129(c)(1) provides that where determinations by the ITC or Commerce are implemented under subsections (a) or (b), such determinations have prospective effect only. That is, they apply to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which the Trade Representative directs implementation. Thus, relief available under subsection 129(c)(1) is distinguishable from relief available in an action brought before a court or a NAFTA binational panel, where, depending on the circumstances of the case, retroactive relief may be available. Under 129(c)(1), if implementation of a WTO report should result in the revocation of an antidumping or countervailing duty order, entries made prior to the date of Trade Representative's direction would remain subject to potential duty liability.

To ensure that private parties are aware of the effective date of an implemented determination, subsection (c)(2) requires Commerce or the Trade Representative to publish notice in the *Federal Register* of the implementation of determinations under section 129.

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